

**State of Delaware**

**Public Integrity Commission**



**ETHICS**  
**TRANSPARENCY IN GOVERNMENT**

**ANNUAL REPORT**  
**2015**

*William F. Tobin, Jr., Chair*  
*Mark Dunkle, Esq. and Andrew Gonser, Esq., Vice Chairs*

*Commissioners*

*Dr. Wilma Mishoe \* Lisa Lessner*  
*Jeremy Anderson, Esq. \* Bonnie Smith*

Published January 20, 2016

# **STATE PUBLIC INTEGRITY COMMISSION**

## **Annual Report - 2015**

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# *I. Mission:*

***Administer, interpret and enforce the Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbying Laws.***

## *Jurisdictional History*

- ✓ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonal; (over 52,000); non-legislative elected officials; State Board and Commission appointees (In 2015, over 300 Boards and Commissions).
- ✓ **1993 – Local Ethics:** 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2015, only 8 have an approved Code, leaving PIC with 49 local jurisdictions).
- ✓ **1994 – Dual Compensation:** State and local employees and officials with a second elected or paid appointed job in government.
- ✓ **1995 – Financial Disclosure:** elected officials; State candidates; Judges, Cabinet Secretaries, Division Directors and equivalents. (2015: 329 officers filed).
- ✓ **1996 – Lobbying:** State lobbyists registration, authorization and expense reports (2015: 343 lobbyists; 1015 organizations; over 3000 expense reports).
- ✓ **2000 – Ethics:** School Districts and Boards of Education
- ✓ **2001 – Ethics:** Charter School Boards of Education
- ✓ **2010 – Organizational Disclosures:** State elected officials & candidates must disclose private organizations if they are Board or Council members.
- ✓ **2010 – Newark Housing Authority:** Newark's Code of Conduct included the Authority, but the General Assembly changed the law to make it a State agency so that PIC would have jurisdiction.
- ✓ **2012 – Lobbyists:** Report within 5 business days legislative bill number or administrative action number or title on which they are lobbying. Report weekly on lobbyists' legislative/administrative action.
- ✓ **2014 – Lobbyists:** Successfully proposed legislation to charge lobbyists a fee for failure to file their expense reports in a timely manner.



# PUBLIC INTEGRITY COMMISSION

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## Commission Structure

### Appointments, Qualifications and Compensation

- 7 Citizens are the “public eye” on Government Ethics
- Nominated by the Governor; confirmed by the Senate
- Elect their own Chair
- Cannot be:
  - ✓ Elected or appointed official – State, Federal or Local
  - ✓ Holder of political party office
  - ✓ An officer in a political campaign
- Generally appointed from all three counties
- Terms – one full 7 year term; may serve until successor is appointed and confirmed
- Vacancies filled just as original appointments
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses

## ***II. Commission Structure and Biographies of Commissioners and Staff***

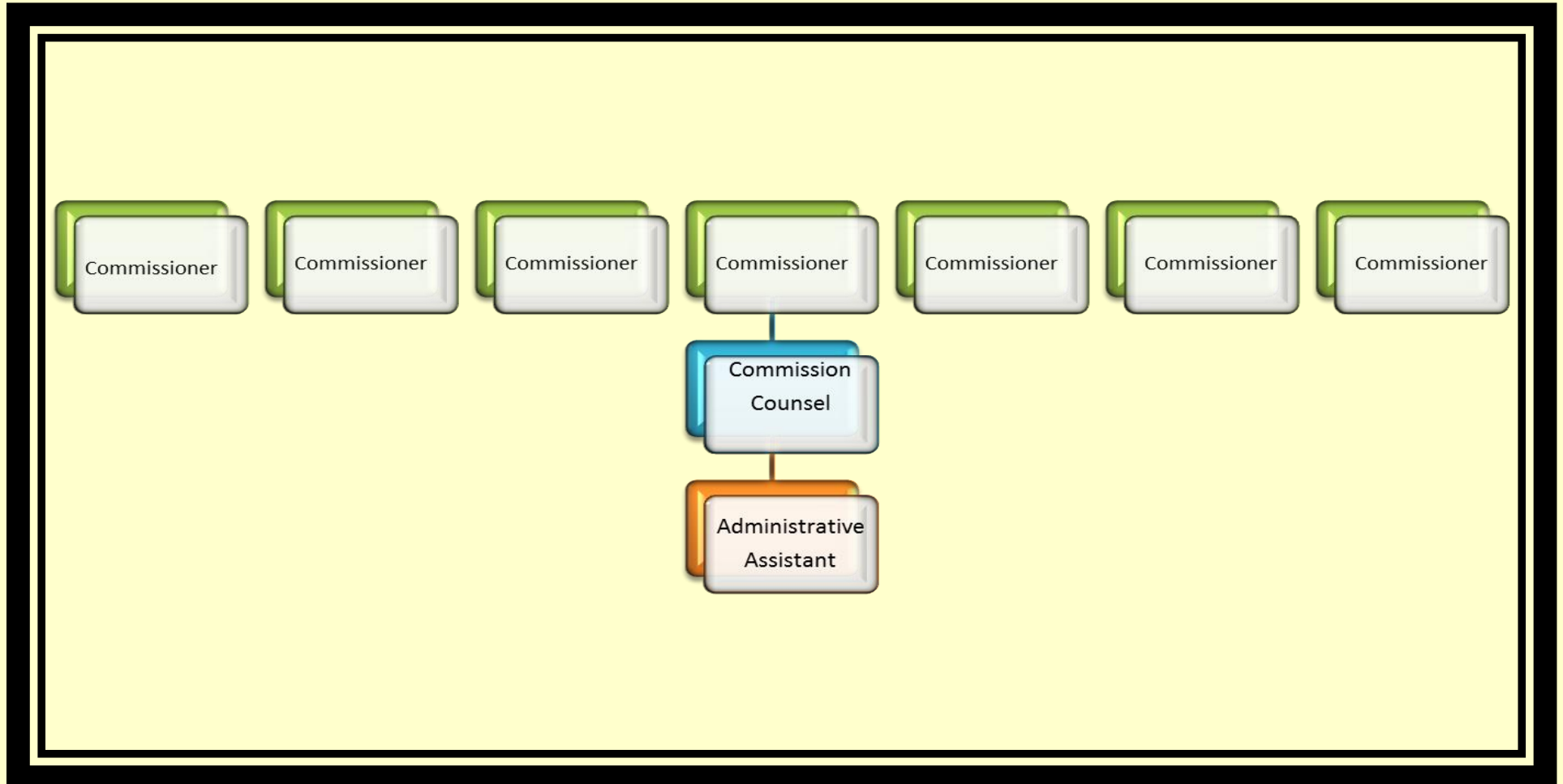
### ***A. Commission Appointee Status***

The Commission did not have any personnel changes in 2015. All three counties of the State are represented with three members of the Commission from New Castle County, two from Kent County and two from Sussex County.

### ***B. Commission Staff***

The Commission has had a two person full-time staff since 1995—its attorney and administrative specialist—performing day-to-day operations. Its attorney, beyond legal duties, conducts training, prepares Strategic Plans, Budgets, and performs other non-legal duties. The Commission's Administrative Assistant performs the administrative functions, updates the website's calendar of events with the Commission agenda, minutes, etc.

### ***C. Organizational Chart***



## ***D. Biographies of Commissioners***



***William F. Tobin, Jr.  
Chair***

William F. Tobin was appointed to complete a few months of the remaining term of former Chair, Barbara Green. Mr. Tobin was reappointed by the Governor in 2013 to serve his own 7-year term which expires in May 2020. He was elected Vice Chair, Policies & Procedures in 2012 and served in that role until he was elected Chair in September 2014. Mr. Tobin was re-elected Chair in November 2015.

Mr. Tobin has served many years in private sector positions, both for-profit and non-profit. His work has included managing budgets of more than \$500,000, and other fiscal aspects such as inventory control, asset management and audit reviews. He is presently a

credit manager and safety director for George Sherman Corporation, Lewes, Delaware. He also has an extensive background in sales, and trained and mentored new and existing sales staff.

His public sector experience ranges from 7 years of active duty in the U.S. Coast Guard, where he developed extensive emergency management skills, to training fire company members on Small Boat Handling in conjunction with the Delaware State Marine Police.

He has long been an active member and officer of organizations in the fire and rescue areas, serving as Treasurer and Co-Chair of the Fire and Rescue Boat Committee, Memorial Fire Company; Sussex County Technical Rescue Team as the Finance and Budget Executive, and member of the Delaware State Fire Police and Indian River Fire Company; and Executive Administrator, assistant treasurer, finance Board member of Georgetown American Legion Post #8, Ambulance State #93.

Aside from his interest in fire and safety, he is active in his community as Treasurer, Lower Delaware Shield and Square; American Legion Post #5 member; St. John's Masonic Lodge member; DE Consistory member, and Nur Temple member.

Commissioner Tobin resides in Harbeson, Sussex County, Delaware.



***Mark F. Dunkle, Esq.***  
***Vice Chair, Policies & Procedures***

Mr. Dunkle was confirmed for a seven year appointment to the Commission on June 30, 2009. His term will expire on June 30, 2016. Mr. Dunkle was elected as Vice Chair, Policies & Procedures in September 2014 and re-elected in November 2015.

Mr. Dunkle is an Attorney/Director in the law firm of Parkowski, Guerke & Swayze, P.A., which has offices in all three counties. He has been a Director in this firm since July 1996.

Before receiving his law degree from Emory University School of Law in Georgia, he graduated with distinction from the University of Virginia with a degree in history. Upon completion of his law degree, he was admitted to the Georgia Bar, and three years later was admitted to the Delaware Bar. Aside from his admission to practice in all Delaware State Courts, he is admitted to practice in Pennsylvania, the U.S. District Court, District of Delaware, and the United States Supreme Court.

Mr. Dunkle is well-published in, and has made presentations on, land use law. Among his publications and presentations are: "Municipal Annexation Law in Delaware," "Delaware Land Use Law," "Delaware Condemnation Law," and "Eminent Domain Law in Delaware." His presentations have been through the auspices of the Delaware Urban Studies Institute, the National Business Institute, and the Delaware State Bar Association. Also, in the area of land use, he was a member of the Kent County Comprehensive Development Plan Update Committee, and a member of the Kent County Transfer of Development Rights Committee. In the area of publications, he also served as co-editor of *In Re*, the Journal of the Delaware State Bar Association. Mr. Dunkle also serves as Chair of the Delaware Chapter of the American College of Mortgage Attorneys.

He chaired the Governor's Magistrate Screening Committee for over ten years. He is a past member of the Delaware Board of Bar Examiners Character and Fitness Committee and serves by appointment of the Delaware Supreme Court on the Preliminary Investigatory Committee of the Court on the Judiciary. He also has served on the Executive Committee of the Delaware State Bar Association and is a past-President of the Kent County Bar. Presently, he is a member of the Permanent Advisory Committee on Supreme Court Rules by appointment of the Chief Justice.

Mr. Dunkle has been active in the community of Dover and surrounding areas by serving as President of the Capital City Rotary Club and as a



member of the Greater Kent Committee and the local Chamber of Commerce.

Mr. Dunkle resides in Wyoming, Kent County, Delaware.



***Bonnie O'Day Smith***  
***Vice-Chair, Personnel***

Ms. Smith was appointed to the Public Integrity Commission on March 26, 2014. Her term expires on March 26, 2021. Ms. Smith was elected Vice-Chair of Personnel in November 2015.

Ms. Smith retired from Sussex County government in November 2013, after 44 years of dedicated service. During her employment, Ms. Smith worked her way up the career ladder from an entry level position to become the Director of Data Processing. Ms. Smith developed the computer software used by all County employees.

Ms. Smith received her Associates Degree from Delaware Technical & Community College in Georgetown and was a member of the school's first graduating class. During the course of

her career, she also received several training certificates from IBM.

Ms. Smith has previously served on the Delaware Technical and Community College Advisory Computer Information Systems Board. She has been involved in community activities such as the Lions Club and the Bridgeville Volunteer Fire Company. She attended Chaplain Chapel and is now attending Union United Methodist Church of Bridgeville. Ms. Smith has become a Fund for Women Founder, a Delaware organization that raises funds for various charities throughout the State.

She currently resides with her husband Thomas and their dog Greedy in Bridgeville, Delaware.



***Lisa Lessner***

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a seven year term, expiring in 2017.

Mrs. Lessner is currently working as a fund raising consultant for Innovative

Schools, a charter school management organization based in Wilmington.

For the past 17 years, Mrs. Lessner has actively worked as a community volunteer for various non-profits. She is currently a board member of the Boys and Girls Club of Delaware, Albert Einstein Academy, and Leading Youth Through Empowerment (LYTE), and also volunteers as a mentor for Creative Mentoring and in various capacities at Wilmington Friends School. Mrs. Lessner was a founder and board member of the Delaware Children's Museum for 14 years. Volunteering more than 1,000 hours a year, she chaired its Marketing and Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Mrs. Lessner's efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she also was a Board member of Albert Einstein Academy (2001-2007), and a Delaware Theatre Company Board member (2009-2010).

Mrs. Lessner's business acumen began with a University of Delaware Bachelor

of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner and her family reside in Wilmington, DE.



***Wilma Mishoe, Ed.D.***

Dr. Mishoe was confirmed as a 7-year appointee to the Public Integrity Commission on March 15, 2011. Her term will expire in 2017. She was

elected as the Vice Chair for Policies & Procedures during the first full year of her term, and in Oct. 2012 she was elected Commission Chair. Dr. Mishoe served as Commission Chair until September 2014.

Dr. Mishoe earned her doctorate at Temple University where her dissertation was on the preferred learning styles of learning disabled adults at post-secondary institutions. She earned both her Masters and Bachelor Degrees from Howard University, Washington, D.C.

Dr. Mishoe was employed at Delaware Technical & Community College for 30 years, and retired at the end of 2010 after having served as Dean of Student Services followed by Dean in the Office of Instruction. She also had been Dean of Students and Director of Financial Aid at Wilmington College (now University) from 1975-1980. Before that employment, she worked for The Brookings Institution in Washington, D.C.

She remains active in educational and community activities. Most recently, she served as Acting President of Wilberforce University in Ohio, where she had previously served as a member and Secretary of the Board of Trustees, chairing the Academic, Student Affairs and Compliance Committee. She is presently a member of the Board of Trustees at Delaware State University. She is also a member of Children and Family First, and Supporting Kidds Boards of Directors; VSA Delaware – The State Organization on Arts and Disability; and is on the Board of Stewards Pro Tem for Mts. Zion A.M.E. Church, Dover.

Dr. Mishoe has held memberships and positions as Treasurer of the Dover Rotary Club; Vice President and President, Dover Alumnae Chapter, Delta Sigma Theta Sorority, Inc., a public service organization of college-educated women, founded in 1913; Vice President and Treasurer of the Dover, (DE) Chapter of The Links, Incorporated. Founded in 1946, it is one of the oldest and largest volunteer service organizations of women who are committed to enriching, sustaining and ensuring the culture and economic survival of African Americans and other persons of African ancestry. Dr. Mishoe has received numerous honors and awards for her community leadership and work in education. Most recently, the Delmarva Black Chamber of Commerce awarded her its Leadership and Service Award in Education. In past years, she received the Citizen of the Year Award from Psi Iota Chapter, Omega Psi Phi Fraternity, Inc.; Employee of the Year Award from DelTech (Terry Campus); and Super Stars in Education Finalist from the Central Delaware Chamber of Commerce. She was a Certified Mediator by the Center for Community Justice, and received the First Line Leadership Certification from the State of Delaware.

She co-chaired the Mid-Eastern Association of Education Opportunity Program Personnel Student Leadership Conference; and through the National Council of Education Opportunity Association's Legislative Policy Seminar, she gave a presentation to Delaware's congressional assistants on the Title IV student services programs designed to identify and provide services for individuals from disadvantaged backgrounds.

Dr. Mishoe resides in Dover, Delaware, and in March 2013 was selected to be inducted into the Delaware Commission for Women's Hall of Fame of Delaware Women.



***Andrew W. Gonser, Esq.***

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2017. In 2012, he was elected to serve as Vice Chair, Personnel and re-elected in 2013 and 2014. Mr. Gonser relinquished his position as Vice-Chair in 2015, per PIC Rules limiting the maximum term of office to three years.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He currently serves as Chair of the Family Law Section of the Bar Association and has won numerous awards including being Voted Top Family Law Attorney in Delaware Today multiple times.

After graduating *cum laude* from Widener University of School of Law in 2004, he clerked for the Honorable Jan R. Jurden, Delaware Superior Court. He is admitted to practice in all Delaware Courts, the U.S. District Court (Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster care system. He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington with his wife and five children.



***Jeremy D. Anderson, Esq.***



Mr. Anderson was appointed, to complete six years of a former Commissioner's seven-year term, on June 30, 2011. His term will expire on June 30, 2017.

Mr. Anderson, a principal at the law firm of Fish & Richardson, PC, leads and tries corporate and complex commercial cases in the Delaware Court of Chancery. Mr. Anderson handles technology-related cases that are brought to protect and defend the intellectual property of companies across several industry sectors such as Life Sciences, Computer Software, and Media and Entertainment. He has successfully represented clients in actions involving non-practicing entities (NPEs) regarding the fraudulent transfer of patents and breaches of covenants not to sue. He obtained a motion to dismiss a multi-forum shareholder derivative lawsuit that was based on his client's substantial monetary settlement with the federal government recently, and in another case defended a preliminary injunction seeking to stop a technology company from filing a patent infringement action in federal court.

As the head of Fish & Richardson's Corporate Governance and Chancery Litigation Practice, Mr. Anderson also represents corporations in high-profile cases involving mergers and acquisitions, stock appraisal, indemnification of officers and directors, demands for corporate records and misappropriation of trade secrets.

Mr. Anderson is the co-author of Technology Litigation in the Delaware Court of Chancery, a treatise that provides comprehensive analysis of technology-related claims such as breach of fiduciary duty, misappropriation of trade secrets,

breach of contract, unfair competition, civil conspiracy, and aiding and abetting. He is a thought leader on stock appraisal actions, and has authored articles that have been quoted in the Wall Street Journal, New York Times, Financial Times and Bloomberg. He frequently contributes to the "Chancery Daily" as a guest columnist and to Fish & Richardson's commercial litigation blog.

Mr. Anderson is a member of the Delaware Bar Association, where he served as Assistant to the President and as member of the Executive Committee from 2010-2011. In October 2007, Mr. Anderson founded the Delaware Chapter of the J. Reuben Clark Law Society, a service organization that strives to promote fairness and virtue founded on the rule of law. He has been named a "Delaware Rising Star" by Super Lawyers in multiple years.

Mr. Anderson received his law degree from Georgetown University Law Center, in Washington, D.C., where he was the Senior Editor for Law and Policy in International Business. After graduation, he clerked for the Honorable Kent A. Jordan, United States District Court for the District of Delaware.

Mr. Anderson resides in Hockessin, Delaware.

## ***D. Commission Staff***

### ***Deborah J. Moreau, Esq. Commission Counsel***

As an independent agency, the Commission appoints its own attorney. 29 Del. C. § 5809(12). Ms. Moreau was appointed in June 2013, replacing the Commission's previous counsel of 18 years.

A Widener University School of Law graduate (*cum laude*), Ms. Moreau was a member of the Delaware Journal of Corporate Law. During law school she received two awards for her writing submissions. The Herman V. Belk Memorial Award was given in recognition of excellence in writing for an article written to gain admission to the law review in 2003. In 2004, she received the Donald E. Pease Best Student Article Award. Ms. Moreau's (*ne* Buswell) award-winning article was published in the law review. (Foreign Trade Antitrust Improvements Act: A Three Ring Circus – Three Circuits, Three Interpretations (Delaware Journal of Corporate Law, Vol. 28, No. 3, 2004)). The article has been cited in numerous professional materials. During her third year of law school, Ms. Moreau worked as an intern at the Delaware Department of Justice and was provisionally admitted to the Delaware Bar under Delaware Supreme Court Rule 55. That early admission allowed Ms. Moreau to prosecute misdemeanor cases in Family Court before graduation from law school.

Ms. Moreau was formally admitted to practice law in Delaware in 2004. The

following year she was admitted to the

U.S. Third Circuit Court of Appeals. Ms. Moreau continued her career at the Delaware Department of Justice as a Deputy Attorney General for the Criminal Division. While she was a prosecutor, Ms. Moreau handled hundreds of cases, in a variety of courts. She has practiced in Family Court, the Court of Common Pleas and Superior Court. Her varied caseloads included domestic violence, juvenile crime, sexual assaults, guns, drugs, property, robbery, burglary, and murder. Ms. Moreau's work as a prosecutor allowed her to gain extensive trial experience.

Ms. Moreau resides in Harrington, Delaware with her husband.

### ***Administrative Assistant Jeannette Longshore***

Jeannette Longshore was hired in 2006, as a temporary employee when the Commission's full-time administrative specialist was absent. She was hired full-time in June 2007.

Ms. Longshore worked at Delaware Technical Community College, Hewlett-Packard, and Agilent Technologies. She has experience in Microsoft Word, Excel, Access, and other computer skills. She performs the day-to-day administrative specialist functions, and updates the Commission's calendar of events on its web site with its agenda and minutes, and attends and takes minutes at the meetings, etc. She has

completed courses on the State Budget and Accounting; Program Management Office Training; and Grammar and Proofreading. Ms. Longshore has become proficient in the technical aspects of the Public Integrity Reporting System.

Ms. Longshore volunteers at The Emmanuel Dining Hall in Wilmington, Delaware, feeding the homeless.



### ***III. Laws Administered by the Commission***

#### **❖ Subchapter I, Code of Conduct**

Executive Branch and local government ethics;

#### **❖ Subchapter II, Financial and Organization Disclosures**

Executive, Legislative and Judicial Branch public officer's annual report of financial interests, such as assets, creditors, income, and gifts. All State elected officials and State candidates must also disclose private organizations of which they are a Board or Council member.

#### **❖ Subchapter III, Compensation Policy**

State or local employees or officials holding dual government jobs with procedures to monitor and prevent "double-dipping;"

#### **❖ Subchapter IV, Lobbying**

Lobbyists' registration, authorization, expense reports, and specific legislative or administrative actions on which they are lobbying State officials or employees.



## ***A. Subchapter I, Code of Conduct – Ethical Standards***

### **Purpose and Jurisdiction:**

Twelve (12) rules of conduct set the ethical standards for “State employees,” “State officers,” and “Honorary State Officials,” in the Executive Branch. *29 Del. C. § 5804(6), (12) and (13)*. It also applies to local governments, unless the local government has a PIC-approved Code that is as stringent as State law. *29 Del. C. § 5802(4)*. The purpose is to instill the public’s respect and confidence that employees and officials will base their actions on fairness, rather than bias, prejudice, favoritism, etc., arising from a conflict, or creating the appearance thereof. *29 Del. C. § 5802*.

### **Personal Jurisdiction – State Level:**

The Code of Conduct applies to all Executive Branch employees (rank and file, including part-time), officers (elected and appointed senior level Executive Branch officials), and honorary State officials (appointees to more than 300 Boards and Commissions). Approximately 52,000 persons are in those State categories.

## Personal Jurisdiction – Local Level:



At the local level, the number of employees, officers and officials in the local governments over which the Commission has jurisdiction is unknown.

In **2015**, local governments who had adopted their own Codes of Conduct included: New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, Delaware City, and Wilmington. As they have their own Code, the Commission no longer has jurisdiction over their employees, officers, and appointed officials. The remaining 49 local governments

are under PIC's jurisdiction. In 2013, PIC approved a proposed Code of Conduct for the Town of Dewey Beach which has not yet been formally adopted by the town council.

## Subject Matter Jurisdiction:

The Code of Conduct restricts participating in an official government capacity if there is a personal or private interest in a matter before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; bars officers (senior level officials) from representing or assisting a private enterprise before any agency; limits public servants in obtaining contracts with the government entity with which they serve; restricts their activities for 2

years after terminating State employment. 29 Del. C. § 5805. The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; improper use or disclosure of government confidential information; and/or use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency. 29 Del. C. § 5806. The Code also bars conduct that creates a justifiable impression, or that may “raise public suspicion,” of improper conduct, 29 Del. C. § 5802(1) and § 5806(a). Thus, the Commission considers if there is an appearance of impropriety.

The appearance of impropriety, under the Code of Conduct, is evaluated using the Judicial Branch standard, as interpretations of one statute may be used to interpret another when the subject (ethics) and the standard (appearance of an ethics violation) apply in both (public servant) cases. *Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992).*

## **Penalties:**

Both criminal and administrative penalties may be imposed.

**(1) Criminal Prosecution:** The General Assembly, in passing the law, found that some standards of conduct are so “vital” that the violator should be subject to criminal penalties. 29 Del. C. § 5802(2). Four (4) rules carry criminal penalties of up to a year in prison and/or a \$10,000 fine. 29 Del. C. § 5805(f). Those rules are that employees, officers, and honorary officials may not: (1) participate in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) represent or assist a private enterprise before their own agency and/or other State agencies; (3) contract with the State absent public notice and bidding/arm’s length

negotiations; and (4) represent or assist a private enterprise on certain State matters for 2 years after leaving State employment. *29 Del. C. § 5805(a)(2)*. Beyond referring suspected Code violations for criminal prosecution (see more information below), if a majority of Commissioners finds reasonable grounds to believe a violation of other State or Federal laws was violated, they may refer those matters to the appropriate agency. *29 Del. C. § 5807(b)(3) and(d)(3); § 5808(A)(a)(4); and § 5809(4)*.

In **2015**, PIC's criminal enforcement power was greatly enhanced by the Attorney General's creation of the Office of Civil Rights and Public Trust (OCRPT). (See Appendix A—Press Release from the Attorney General's Office). When PIC uncovers a Code of Conduct violation for which there are criminal penalties, the matter may be referred to OCRPT for further investigation and possible criminal prosecution. In **2015** PIC referred two matters to the Attorney General's office for further investigation and possible prosecution. In the first matter the AG's investigation confirmed there had been a violation of the Code of Conduct but under the circumstances declined prosecution. The second matter is still pending with the AG's office.

**(2) Administrative Sanctions:** Violating the above rules may, independent of criminal prosecution, lead to administrative discipline. *29 Del. C. § 5810(h)*.

Under some rules both criminal and/or administrative sanctions may occur, but violating the following rules results only in administrative action: (1) improperly accepting gifts, other employment, compensation, or anything of monetary value; (2) misuse of public office for private gain or unwarranted privileges; and (3) improper use or disclosure of confidential information. *29 Del. C. § 5806(b), §5806(e) and § 5806(f)*

*and (g).*

Disciplinary levels: (1) reprimand/censure of any person; (2) removing, suspending, demoting, or other appropriate disciplinary action for persons other than elected officials; or (3) recommending removal from office of an honorary official. 29

*Del. C. § 5810(h).*



## ***B. Subchapter II, Financial and Organizational Disclosure Requirements***

Both the financial disclosure report and the organizational disclosure are snapshots of any interest held by an official as of the date reported. The decision on whether those interests, or any acquired after that date but not yet reported, create a conflict of interest, is based on the conflict laws for that particular officer. Executive Branch elected officers are subject to the State Code of Conduct; Legislators are subject to the Legislative Conflicts of Interest law; and Judicial officers are subject to the Judicial Code of Conduct.

### **FINANCIAL DISCLOSURE:**

#### **Purpose:**

Subchapter II is meant to instill the public's confidence that its officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. 29 Del. C. § 5811. Compliance, in part, is insured

when they report financial interests shortly after becoming a public officer, (14 days), and each year thereafter on March 15, while a public officer. *29 Del. C. § 5813(c)*. Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance.

### **Personal Jurisdiction:**

More than 300 “public officers” in the Executive, Legislative, and Judicial branches must file financial disclosure reports within 14 days of becoming a public officer and on March 15 each year thereafter. *29 Del. C. § 5813(c)*. Filers include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. *29 Del. C. § 5812(n)(1)*. PIC received 329 Financial Disclosure filings in March 2015. As State candidates must also file, the number of filers per year varies depending on the number of candidates in a given year.

### **Subject Matter Jurisdiction:**

Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held with or by their spouses and children, regardless of direct benefits. *29 Del. C. § 5813*.

### **Penalties:**

Willful failure to file a report is a Class B misdemeanor. Knowingly filing false information is a Class A misdemeanor. *29 Del. C. § 5815*. The Commission may refer suspected violations to the Commission Counsel for investigation and to the AG for investigation and prosecution. *Id.* The penalties are: (1) up to six months incarceration

and/or a fine of up to \$1,150 for a Class B misdemeanor, *11 Del. C. § 4206(b)*; and (2) up to one year incarceration and a fine of up to \$2,300 for a Class A misdemeanor, *11 Del. C. § 4206(a)*. The Court may also require restitution or set other conditions as it deems appropriate. *11 Del. C. § 4206(a) and (b)*.

## **ORGANIZATIONAL DISCLOSURES:**

### **Purpose:**

Potential conflicts can arise from associational interest, even without a financial interest, and if the organization seeks action by the General Assembly, the Governor, Lt. Governor, Treasurer, Auditor, Insurance Commissioner, or Attorney General, the annual reporting reminds them of that possibility. The reports are public records, and may be requested on the [FOIA form](#), on the Commission's website. That allows the public to also monitor the financial and associational interests of these officials.

### **Personal Jurisdiction:**

State elected officials and Candidates for State office are required to disclose their memberships on councils or boards. *29 Del. C. § 5813A*. Other public officers, e.g. cabinet secretaries, division directors, and their equivalents are not required to file this information.

### **Subject Matter Jurisdiction:**

Elected officials and candidates must disclosure the name and address of every nonprofit organization, (excluding religious organizations), civic association, community association, foundation, maintenance organization, or trade group incorporated in the



State or having activities in the State, or both, of which the person is a council member or board member. *29 Del. C. § 5813A.*

**Penalties:**

Same as for financial disclosure reporting violations.



### ***C. Subchapter III - Compensation Policy – “Anti-Double Dipping Law”***

#### **Purpose:**

Some elected and paid appointed officials hold a second job with State agencies or local governments. Taxpayers should not pay an individual more than once for overlapping hours of the workday. *29 Del. C. § 5821(b)*. To build taxpayers' confidence that such employees and officials do not “double-dip,” those with dual positions must have their Supervisor verify time records of hours worked at the full-time job on any occasion that they miss work due to the elected or paid appointed position. *29 Del. C. § 5821(c) and § 5822(a)*. The full-time salary may be prorated, unless the dual employee uses leave, compensatory time, flex-time or personal time. *Id.*

#### **Jurisdiction:**

The number of people to whom this law applies varies based on how many State and local government employees hold dual, government (state, municipal, county)

employment.

For those holding dual positions, who also are subject to the Code of Conduct—Executive Branch and local governments--the “double-dipping” restrictions are reinforced by the ethical limits on holding “other employment.” *29 Del. C. § 5806(b)*. Complying with the ethics provision is extra insurance against “double-dipping,” and also helps insure the “other employment” does not raise ethical issues. Further assurance against double-dipping is that the statute requires the Auditor to annually audit time records. *29 Del. C. § 5823*. Generally, the audit is comprised of time records for General Assembly members who are also State employees.

In November **2015**, PIC received the Dual Compensation Report for the period of July 1, 2011 through December 31, 2013, from the State Auditor’s Office. (See Appendix B). In summary, the report found that the State does not have adequate rules and procedures in place to allow for adequate oversight of the Dual Compensation law. Furthermore, the population of individuals who received dual compensation from government entities was unable to be determined from data available to PIC. While PIC does collect financial information from the State’s Public Officers, it does not have jurisdiction to collect that information from individuals employed by towns, municipalities or counties within the State who may collect dual government income. Substantial changes to the Dual Compensation law are necessary to allow PIC to gather the information necessary to properly administer this portion of the code. PIC is not opposed to expanding its jurisdiction to include Financial Disclosures from municipal and county employees so long as it receives additional manpower and resources to ensure the additional responsibilities are properly administered.

## **Penalties:**

Aside from pro-rated pay where appropriate, discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under any appropriate criminal provision. *29 Del. C. § 5823.*



## ***D. Subchapter IV – Lobbyist Registration and Reporting***

### **Purpose:**

Individuals authorized to act for another, whether paid or non-paid, must register with the Commission if they will be promoting, advocating, influencing or opposing matters before the General Assembly or a State agency by direct communication. 29 *Del. C. § 5831*. Lobbying registration and reporting informs the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” *United States v. Harris*, 347 U.S. 612 (1954).

### **Jurisdiction:**

When PIC began administering the lobbying registration law in 1996, there were approximately 200 organizations represented by lobbyists. At the end of **2015**, 330 lobbyists, representing 963 organizations, were registered.

## Reporting Requirements:

Each lobbyist is to file quarterly reports revealing direct expenditures on General Assembly members and/or State agency members. *29 Del. C. § 5835(c)*. That results in 3,852 expense reports. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. *Id.* In 2015, lobbyists reported expenditures totaling \$70,463.53. In addition to reporting expenditures, lobbyists are also required to report their lobbying activity. Lobbyists must report legislation by bill number or administrative action by number or title, within 5 business days of lobbying a State official. *29 Del. C. § 5836*. “Lobbying” consists of direct communication with a State employee or official, including General Assembly members, for the purpose of advocating, promoting, opposing, or influencing legislation or administrative action. *29 Del. C. § 5831(5)*. The law also required that all registration, expense reports, and the new “Lobbying Activity Report” be filed online. *29 Del. C. § 5832(a)*.

Beyond the “Lobbying Activity Reports” that the lobbyists must file, the 2012 legislation required PIC to report all lobbying activity to the General Assembly on at least a weekly basis while the General Assembly is in session. *29 Del. C. § 5836(d)*. Further, it required that a [searchable public database](#) be created so that the public could search for information on the names of lobbyists and their employers, expense reports, and the Lobbying Activity Report. *29 Del. C. § 5836(d)*.

In 2013, the Public Integrity Reporting System (PIRS) was created in an effort to accommodate the new legislative reporting requirements. The new database was announced as the Web 2.0 Award winner in the “Harnessing the Power of Civic Media” category by the Public Technology Institute (PTI). Users of PIRS can see which

lobbyists are involved in specific legislation or administrative regulation, and view lobbyists' employers and financial disclosures. The new system also made it easier for lobbyists and public officials to submit required lobbying and gift-related reports online. The PIRS online interface is also mobile-friendly, allowing lobbyists to report, and citizens to search using smartphones, tablets and other mobile devices.

## **Penalties:**

**Administrative:** PIC may impose the administrative penalty of cancelling a lobbyist's registration for failure to timely file their expense reports at the end of each calendar quarter. They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.* Obviously, this affects their ability to represent an organization in which they are interested enough to volunteer, or affects their job performance if they cannot perform their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled, the Commission sends several failure-to-file notices via e-mail, followed by certified letter. If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. The names of delinquent filers are available on PIC's website by searching lobbyist reports by quarter.

Over time the administrative penalty has ceased to be an effective compliance tool. In the first quarter of 2014, there were 79 delinquent lobbyists. By the end of the third quarter there were over 100 delinquent lobbyists. Compare those numbers with a total of 15 delinquent lobbyists for the fourth quarter of 2013.

**Financial:** As a result of the increasing number of delinquent filers, in 2014 PIC successfully introduced legislation to impose a financial penalty on lobbyists for failure

to file expense reports in a timely manner. Beginning in **2015**, delinquent lobbyists were required to pay a \$25 fine for the first day of their delinquency. Thereafter, an additional \$10 per day accumulated to a maximum fee of \$100. Lobbyists may not resume lobbying until all fees have been paid and all delinquent reports have been filed. In the third quarter of **2015**, the number of delinquent filers was reduced to 33. In

**CY2015** PIC collected \$3220 in late fees.

**Criminal:** Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. *29 Del. C. § 5837*. Unclassified misdemeanors carry a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other conditions as the Court deems appropriate. *11 Del. C. § 4206(c)*.





#### ***IV. Methods for Achieving Compliance***

##### **(1) Training and Publications - 29 Del. C. § 5808(A)(a)(1)**

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, etc., are the Commission Counsel's statutory duties.

*Id.*

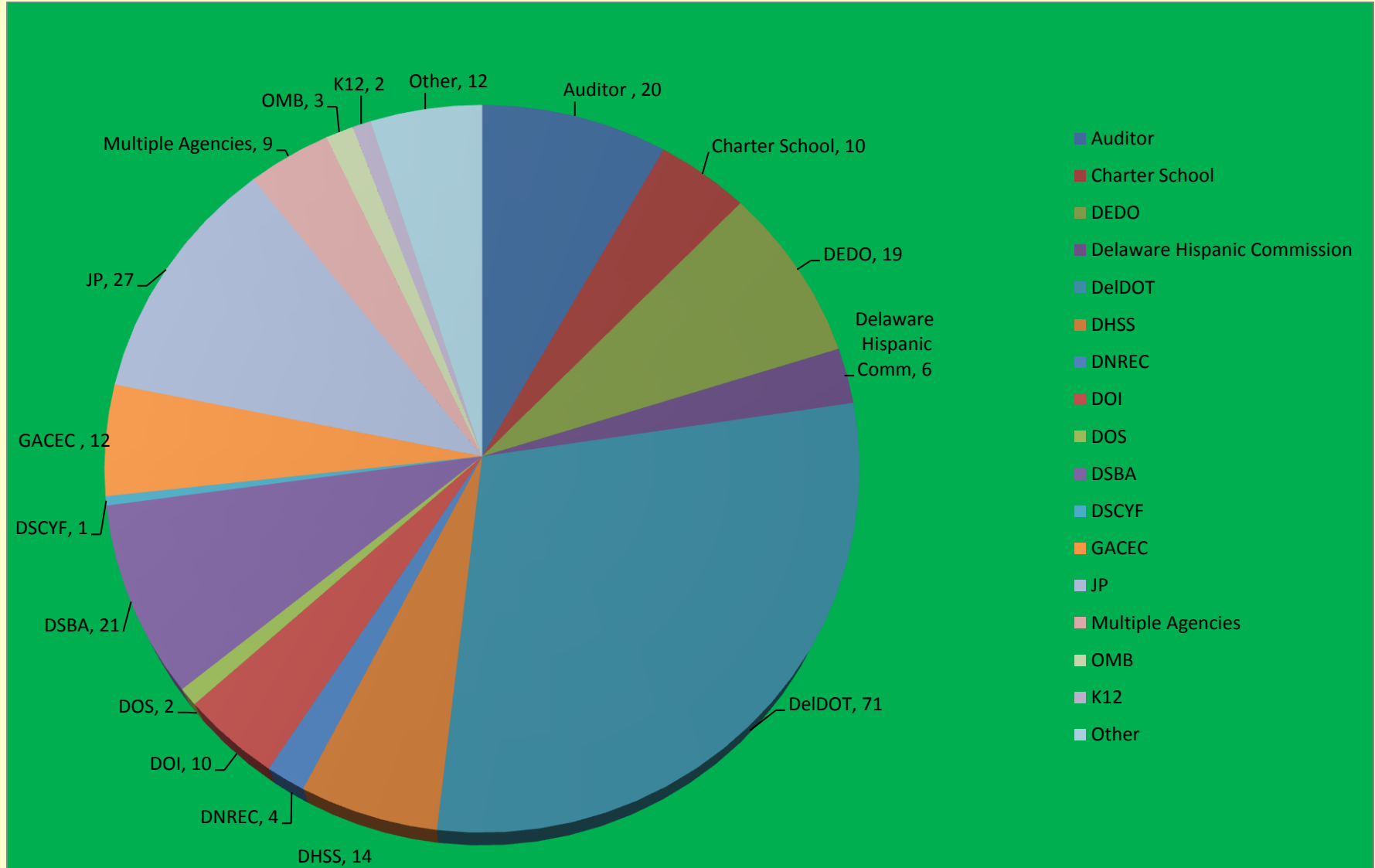
To best assist government officials and lobbyists in understanding and complying with the law, the Commission's primary focus is on training. Training is reinforced by handouts and publications which can be reviewed later. For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief case examples is provided. It also has procedures for obtaining advice or waivers, and filing complaints.

Opinion synopses are available on PIC's website. The synopses are sorted by topic and include a summary of all matters decided by the Commission from 1991 to 2015. As individuals encounter similar situations, they can refer to the cases. The web site also includes the Delaware Code of Conduct, all Ethics Bulletins, a brochure on

Delaware's gift laws, the Commission's rules and its Annual Reports. For Financial Disclosure filers and Lobbyists, the web site has instructions for on-line filing. Lobbyists can link to the Legislative Bill Drafting Manual if drafting legislation for clients. The web site also includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

In **2015**, the Commission presented 15 training classes to a total of 243 attendees. The training classes were presented to a wide variety of state, county, and legislative entities. In an effort to reach more State employees, PIC created an online training module which is available through the Office of Management and Budget's Training Website. The module is a 30 minute introduction to common ethics issues facing State employees. It does not replace the more in-depth, in-person training sessions. Since its introduction in July **2015**, 496 employees have completed the training module.

## 2015 Live Ethics Training by Agency

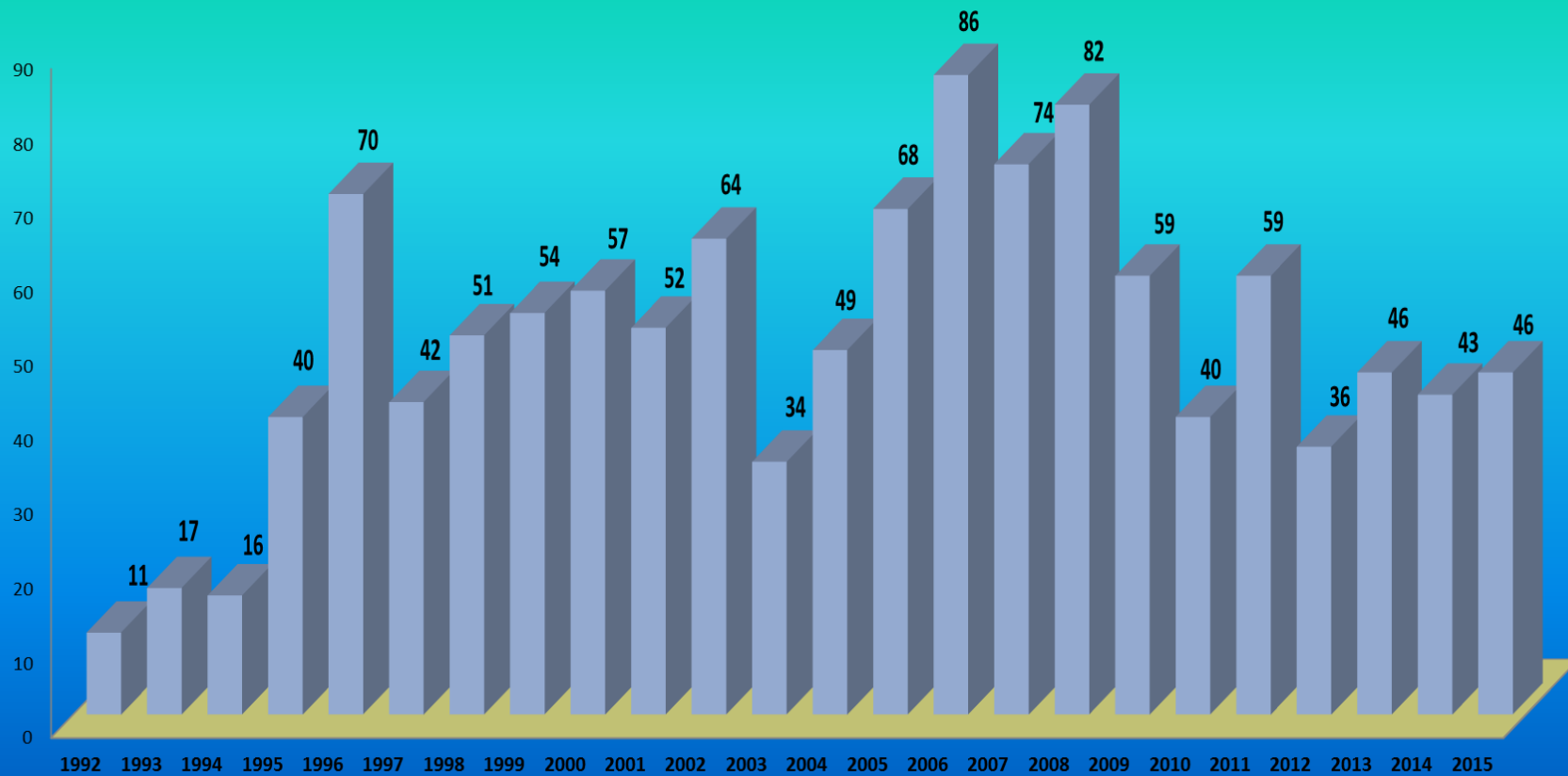


## **(2) Advisory Opinions - 29 Del. C. § 5807(c).**

Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them. While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waiver service on particular fact situations gives the individual personal attention on a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. 29 Del. C. § 5807(c). Synopses of those opinions later become learning tools at training classes and are available on our website.

In **2015**, PIC acted on 46 requests for written advice. 32 formal advisory opinions were issued by the Commission and Commission Counsel responded to 14 requests for written informal advice. (See chart below). The number of requests for opinions has been fairly stable over the past three years. This is likely due to the fact there have not been any changes to the Code of Conduct. The Commission typically sees spikes in the number of requests when there is a change in the Code.

**No. of Opinions Issued 1991 - 2015**



**(A) Waivers - 29 Del. C. § 5807(a)**

Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. In rare cases, an individual may need to deviate from the law. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or employee. Waivers are open records so the public knows why a deviation from the law was allowed in a particular case. As some standards are so “vital” that they carry criminal penalties, making the information public further instills confidence that an independent body makes the decision. It also gives the public better exposure to the Commission’s deliberation process which may not be as clear when only a synopsis, that cannot identify the individual by name or through sufficient facts, is permitted.

In **2015**, three waivers were granted. Commission Op. Nos. 15-06, 15-09, and 15-12. (See Appendices C, D, and E). When a waiver is granted, the proceedings become a matter of public record. Those decisions are also available on the Commission’s website.

**(B) Complaints - 29 Del. C. § 5810(a).**

Any person, public or private, can file a sworn complaint. The Commission may act on the sworn complaint, or its own initiative. A majority (4) must find “reasonable grounds to believe” a violation may have occurred. 29 Del. C. § 5808(A)(a)(4). If probable cause is found, the Commission may conduct a disciplinary hearing. 29 Del. C. § 5810. The person charged has statutory rights of notice and due process. Violations must be proven by clear and convincing evidence. If a violation is found, the Commission may impose administrative discipline. 29 Del. C. § 5810(d). It may refer

substantial evidence of criminal law violations to appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Frivolous or non-merit complaints, or those not in the Commission's jurisdiction, may be dismissed. 29 Del. C. § 5809(3).

In **2015**, the Commission did not receive any properly submitted complaints. A complaint must be in writing, allege violations of specific portions of the Code of Conduct with supporting facts, and be properly notarized. In **2015**, every submission was through an anonymous complainant. Without contact information, the Commission could not contact them to explain the procedural flaws. In those cases, the Commission published a synopsis of the dismissal on PIC's website, documenting the procedural deficiencies, with the hopes that the complainant would recognize their submission and contact PIC. The correct form of notarization is below:

29 Del. C. § 4328(3) For a verification upon oath or affirmation:

State of.....

County of.....

Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).

(signature of notarial officer)

(Seal)

(title and rank)

(my commission expires:.....)



## ***V. FOIA Requests***

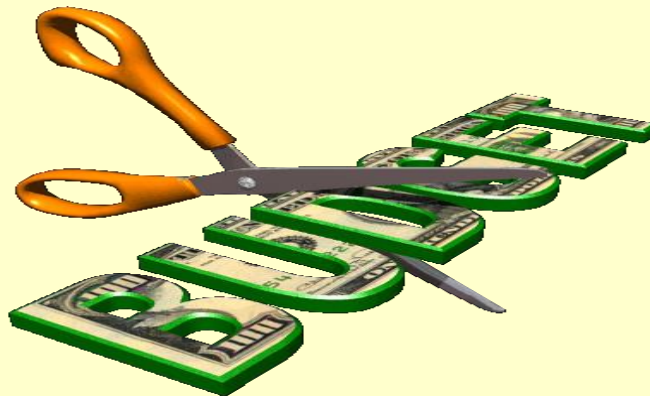
In **2015**, PIC responded to 14 requests for information under the Freedom of Information Act (FOIA). The requests were submitted by a mix of news media, citizens, and private political organizations. Due to the efficiencies of the PIRS database, PIC was able to respond to 8 of those requests within 24 hours. For the remaining requests, the information requested was not related to data maintained in the database and required research to fulfill the request. PIC was able to gather the requested information and responded to those requests within 10 days.





## ***VI. Funding***

In **FY 2016**, which includes the last half of the 2015 calendar year, the General Assembly appropriated \$188,400 for PIC, with an operating budget of \$25,400. That amount is the smallest operating budget since PIC was created in 1996 when the operating budget was \$40,100. Today, PIC's operating budget is 37% less than in 1996. When adjusted for inflation, the operating budget has been **cut** by 58.2% over the past 20 years. Meanwhile, PIC's duties continue to increase.





## ***VII. Legislation***

### **PIC Sponsored Legislation:**

During the 2015 legislative session PIC submitted two pieces of legislation:

- SB 125—Would give Commission Counsel the power to issue an advisory opinion which would provide legal protection to the applicant in the event a complaint was filed against them. Bill passed the Senate but was not brought to the floor in the House for a vote before the end of the legislative session. PIC hopes to have the Bill passed by the House in the 2016 session.
  - In the winters of 2013 and 2014, Commission meetings were postponed numerous times due to inclement weather. The delays led to long wait-times for applicants waiting to appear before the Commission. This Bill would allow Commission Counsel to issue an advisory opinion when the Commission has not been able to meet for 60 or more consecutive days.
- HB 197—Introduced to clean up language in 29 Del. C. §5835 which appears to require lobbyists to report campaign contributions to Delaware's elected executive branch officials on their quarterly expense reports. The Bill was never released from Committee in the House.



### ***VIII. In the News***

**“Delaware gets ‘F’ in accountability investigation”—[The News Journal](#), November 9, 2015, Jon Starkey.**

The article was based on a review of nationwide ethics laws by the Center for Public Integrity, a nonprofit, nonpartisan investigative news organization in Washington, D.C. It is part of State Integrity 2015. While Delaware did receive a failing grade, ranking 48<sup>th</sup> out of 50 states, the title of the article is somewhat misleading. The review focused heavily on transparency in government rather than ethics oversight, in general. PIC believes that substantial legislative action is necessary to increase the State’s ranking.



### ***VIII.Future Goals***

The Commission's focus will be to continue to emphasize education of employees, officers, officials, and lobbyists with the limited resources at our disposal.

**RELEASED JANUARY 7, 2015**

**DEPARTMENT OF JUSTICE CREATES NEW OFFICE OF CIVIL RIGHTS  
AND PUBLIC TRUST**

**New Attorney General Seeks to Improve Office's Focus In Critical Areas**

Attorney General Matt Denn announced today that the Department of Justice would be restructured to create a new Office of Civil Rights and Public Trust. The office will be responsible for protecting individual rights and liberties of Delawareans, enforcement of laws designed to ensure citizen trust in government, and conducting investigations where the Department of Justice's other responsibilities might present the appearance of a conflict of interest.

Denn has appointed Allison Reardon, one of the most senior attorneys in the Department of Justice, to head the new office. Reardon most recently served as State Solicitor, the highest ranking civil attorney in the Department of Justice. Reardon will report directly to the Chief Deputy Attorney General.

"This new office will create a focus for the office on civil rights and citizen trust in government," Denn said. "It will provide the legal firepower to ensure that these important areas are addressed, and will provide citizens with a point of contact in the office when they believe that there are civil rights or public trust issues that must be addressed."

"I am very pleased that Allison Reardon will be heading this new effort. It is important that the person in charge of this effort be a skilled attorney, have sound judgment, and have my confidence. Allison is one of the most respected attorneys in the Department of Justice, and is the perfect person to head up this effort."

The responsibilities of the Office of Civil Rights and Public Trust will include:

1. Enforcement of Delaware laws protecting the individual rights and liberties of Delawareans, including but not limited to rights secured by the Delaware and United States constitutions, Delaware's public accommodations laws, housing discrimination laws, employment discrimination laws, and laws protecting the educational rights of children and the rights of Delawareans with disabilities.
2. Enforcement of laws designed to ensure citizen trust in government, including election laws, laws governing the use of public funds, and laws governing the conduct of public employees and officials. In these areas, the office will work collaboratively with the Elections Commissioner, Public Integrity Commission, and State Auditor.
3. Investigations where the Department of Justice's other responsibilities might present the appearance of a conflict, such as investigations of use of force by law enforcement officers and investigations of deaths or near-deaths of children under state supervision.

Meredith Stewart Tweedie, who previously served as the head of the health law unit for the

Department of Justice, has been selected to take over Ms. Reardon's role as State Solicitor.

Attorney General Denn also announced today that State Prosecutor Kathleen Jennings, Consumer Fraud Director Matt Lintner, and Family Law Division Director Patricia Dailey Lewis would remain in their current positions.

Danielle Gibbs, currently a partner at Young Conaway Stargatt and Taylor will serve as Chief Deputy Attorney General. Gregory Patterson, a former aide to Gov. Jack Markell and to Denn as insurance commissioner, will serve as Chief of Staff and Emily Cunningham, who headed Denn's lieutenant governor staff, will serve as Deputy Chief of Staff in the Department of Justice.

**CLICK ON THE TITLE PAGE TO READ THE ENTIRE REPORT**

**State of Delaware  
Office of Auditor of Accounts**

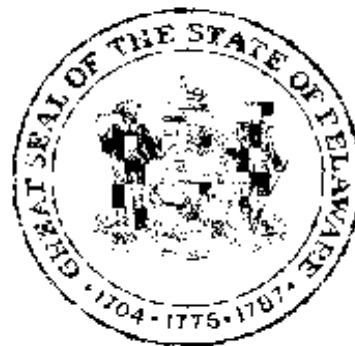
**Dual Employment  
Examination Engagement**

**July 1, 2011 through December 31, 2013**

Fieldwork End Date: October 27, 2015

Issuance Date: November 23, 2015

R. Thomas Warner, Jr., CFE, CGFM, CICA  
Auditor of Accounts





STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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410 FEDERAL STREET, SUITE 3  
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TELEPHONE: (302) 739-2399  
FAX: (302) 739-2398

**April 21, 2015**

Andrew Donohue, M.D.  
DHSS  
1906 Maryland Avenue  
Canby Park—Room 137  
Wilmington, DE 19805

**15-06 Post Employment—WAIVER GRANTED**

**Hearing and Decision By:** *William F. Tobin, Jr., Chair, Mark Dunkle, Esq., Vice Chair; Andrew Gonser, Esq, Vice Chair.; Commissioners: Lisa Lessner, Jeremy Anderson, Esq., Dr. Wilma Mishoe, Bonnie Smith*

Dear Dr. Donohue,

Thank you for attending the Commission meeting on April 21, 2015. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow you to contract with your former State agency once you leave State employment.

**A. FACTS**

You are a forensic psychiatrist employed by the Division of Health and Social Services (DHSS). Your duties are split between the Wilmington Community Mental Health (WCMHC) Center and the Delaware Psychiatric Center (DPC). Approximately 80% of your time is spent treating patients at WCMHC and 20% is spent conducting court-ordered psychiatric evaluations at DPC. The demand for court-ordered psychiatric evaluations has doubled in the past four years<sup>1</sup> while DHSS's need for community treatment providers has changed due to increased outsourcing to private providers. You want to leave State service and contract with DPC as a forensic evaluator working approximately one day per week performing court-ordered evaluations. DHSS plans to find a replacement for you once you resign and they will hire a full-

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<sup>1</sup> According to your comments at the hearing, the number of court-ordered psycho-forensic evaluations in 2010 was 14. In 2014 the number rose to 24.



time psychiatrist to work at WCMHC treating patients. You would then fill DPC's need for a part-time forensic evaluator as a contract employee. When not working for the State, you plan to work in private practice.

You asked the Commission to decide if a contract with your former agency would violate the post-employment restriction in the Code of Conduct. Should the Commission determine that a contractual position with DHSS would constitute a violation, you requested a waiver on the grounds the agency would suffer a hardship if they lost your services. In your comments to the Commission you stated that Delaware has a shortage of psychiatrists and less than one percent of all psychiatrists are board certified in forensic psychiatry. As a result, you anticipate DPC would have a difficult time recruiting a psychiatrist with the proper credentials which would be further complicated by the fact the position is part-time with no benefits. Dr. Gallucci, Medical Director for DHSS agreed with your assessment of the agency's needs. In an email to our office Dr. Gallucci stated:

Dr. Donohue would most likely also be involved in some of the training activities associated with the University of Pennsylvania forensics Fellows who rotate at the Mitchell Building of DPC. Dr. Donohue is a valuable employee with expert skills in forensics psychiatry. We would have difficulty replacing him and the functions he performs should he not be allowed to continue his work with us.

## **B. APPLICATION OF THE FACTS TO THE LAW**

**1. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if you would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law,

*Publisher*; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during employment to the proposed post-employment activities. In your case, the overlap is substantial. You would work for the same agency, with the same director, performing the same tasks you performed while employed by the State. When asked if there would be occasion for you to evaluate the same patients you treated while employed by the State or to evaluate patients you treat in private practice you stated:

Delaware is a small state, so some of the same individuals I have seen at the clinic as their treatment provider may require an evaluation from time to time as the years go by. We make every effort not to have such individuals evaluated by someone who has treated that person in the past, mainly to avoid creating any confusion with regard to the sometimes competing goals of treater (sic) (i.e. trying to help the patient) and evaluator (i.e. trying to objectively answer the judge's question).

You indicated you would recuse yourself where possible but DPC may not have the staff necessary to recuse yourself in every instance and if you did so, an individual may be forced to wait an extended period of time for an evaluation, to their detriment.

The Commission also considered the fact you would be contracting with your former agency. Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions. In this case, it appears you were offered the contract because of your former association with the agency as well as the fact you possess a very specific set of skills required to perform the job.

Considering all those factors, the Commission decided it would violate the post-employment restriction in the Code of Conduct for you to accept the contractual position with DPC. However, for the reasons below, the Commission decided to grant a waiver based on agency hardship.

**2. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

**(a) "Undue hardship,"** means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992))*.

In granting a waiver, the Commission may consider a hardship to either the employee or to the State agency. If you were prohibited from contracting with DHSS, the agency would be placed in the position of having to recruit a psychiatrist qualified to perform court-ordered evaluations from a shallow pool of resources. Further complicating the search for a suitable candidate would be the fact the contract is for a part-time position. If the agency were fortunate enough to find a qualified psychiatrist in Delaware the part-time, contractual nature of the position may create further difficulty (i.e. lack of benefits, etc). Failure to locate a suitable candidate would create a backlog of individuals waiting for psycho-forensic evaluations.

**(b) Is literal application of the law necessary to serve the public purpose?**

Having decided you qualified for a waiver based on agency hardship, the Commission need not consider the public purpose served by the law. However, those considerations are an equally important reason for the Commission to grant the waiver.

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern.

*Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07.*

Court-ordered psycho-forensic evaluations are most often ordered for people accused of crimes. Here, the public has an interest in swift and just resolutions to criminal cases. The need for a court-ordered psycho-forensic evaluation, which provides the court direction on which programs or treatments would most benefit the defendant, often prevents inmates from litigating their cases and being released from custody. If you were prevented from accepting the contractual position with DHSS, it is likely the wait time for an evaluation would rise dramatically and ultimately delay the release of defendants who are presumed innocent until proven guilty. Also weighing in favor of serving the public purpose is the fact that this waiver will be published in its entirety. That ensures that the public knows why you were allowed to contract with the State in contravention of the Code.

**C. CONCLUSION**

Based upon the agency's hardship and in considering the public purpose of your

application, the Commission grants a waiver to allow you to contract with your former State agency.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.  
Chair



STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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June 22, 2015

**15-09 Post Employment—WAIVER GRANTED**

***Hearing and Decision By:*** William F. Tobin, Jr., Chair; Commissioners: Jeremy Anderson, Esq., Dr. Wilma Mishoe, Bonnie Smith;

Imran Trimzi, M.D.  
Residency Program Director  
DHSS  
1901 North DuPont Highway  
New Castle, DE 19720

Dear Dr. Trimzi,

Thank you for attending the Commission meeting on June 16, 2015. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow you to contract with your former State agency once you leave State employment. However, the Commission is concerned that in the past two months two Delaware Psychiatric Center (DPC) employees have requested hardship waivers on behalf of their agency without any justification from the agency itself. Going forward, no other waivers will be granted based upon agency hardship unless the request is made, and substantiated, by DPC leadership. The burden of obtaining a waiver based upon agency hardship is the responsibility of the agency and not the employee. You should know that because a waiver was granted, this opinion will be published in its entirety on our website. 29 Del. C. § 5807(b)(4). Additionally, a copy of this opinion will be forwarded to Dr. Gallucci, Medical Director for the Department of Health and Social Services (DHSS).

**FACTS**

You are a psychiatrist currently working for DHSS as the Residency Training Director at DPC. The residency program trains physicians to specialize in psychiatry with a primary focus on community psychiatry and public service. You currently spend 26 to 30 hours per week working as the program's director. Originally, your position also entailed clinical duties at a facility that has since been closed. You want to leave State employment and contract with DPC

for 25 hours per week to continue as the Residency Training Director. You requested that the Commission consider a waiver if it was determined your contract with DPC would violate the post-employment restriction in the Code of Conduct. You stated that if a waiver were denied DPC would suffer a hardship if they had to find a replacement for your position because no other psychiatrists at DPC perform the same administrative functions required by your position. You also asserted your request for a hardship waiver was supported by Dr. Gallucci, the Medical Director for DHSS.

## **APPLICATION OF THE FACTS TO THE LAW**

**A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if you would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. You made no effort, nor could you have, to distinguish your current State position from the contractual position. You would be leaving State employment to perform the exact same job with the same duties and responsibilities. As a result, the contractual position with your former agency would violate the two year post-employment restriction.

The Commission next turned to a consideration of whether the facts presented qualified as a hardship necessitating a waiver. In order to qualify for a waiver the law requires a showing of hardship to either the employee or the agency, or facts demonstrating that enforcement of the post-employment restriction is not necessary to effectuate the public purpose. 29 Del. C. § 5807(a) and (b).



**B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

**(1) "Undue hardship,"** means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

At the hearing, you denied any demonstrable hardship to yourself if you were not permitted to accept the contractual position with DPC. Although it was a close call, the Commission found you did present facts establishing a hardship on the agency. DPC would be placed in the position of having to find a psychiatrist qualified to manage the Residency Training Program. You stated that when the job was first posted you were the only applicant who applied for the position. When asked why there were so few applicants for the position, you indicated that large urban hospitals in close proximity to Delaware offer more opportunities to psychiatrists seeking employment. Further complicating the search for a suitable candidate is the fact the contract is for a part-time position. If the agency were fortunate enough to find a qualified psychiatrist in Delaware, the part-time, contractual nature of the position would likely create further difficulty in the recruitment process. In this instance, you are willing to work part-time for DPC and your switch from a full-time employee to a part-time contractor would leave a vacancy for a full-time budgeted position which is more likely to appeal to potential job applicants.

**(2) Is literal application of the law necessary to serve the public purpose?**

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. "*Ethics in Government Act*," *Senate Report No. 95-1770, p. 32*. In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07.*

In considering the public purpose, the fact that you would be contracting with your former agency weighed against granting the waiver. It would be obvious to even the most casual observer that you obtained the contract because of your prior employment with the State. Another factor weighing against a waiver is the fact that your position is administrative. A vacancy in your position would not appear to have a significant or immediate impact on DPC's ability to provide services to their clients.

On the other hand, it is clear there would be a limited pool of applicants from which DPC could recruit to fill your position. As a result, the Commission determined that DPC's ability to administer the Residency Training Program would be seriously hindered if you were unable to contract with your former agency. While you do not treat patients directly, you administer a program which brings psychiatrists to the State who, in turn, provide treatment to Delaware's citizens. Also weighing in favor of serving the public purpose is the fact that if the Commission granted the waiver the decision becomes a matter of public record. That ensures that the public knows why you were allowed to contract with your former agency in contravention of the Code.

## **CONCLUSION**

After considering all the relevant facts and circumstances, the Commission decided to grant a hardship waiver to allow you to contract with your former agency as the Residency Training Director. No further waivers will be granted to DPC employees without a showing of agency hardship by DPC's leadership.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.  
Chair

Cc: Gerard Gallucci, M.D.





STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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July 28, 2015

Karryl McManus, Director  
Division of Management Support Services  
Department of Services for Children, Youth, and their Families  
1825 Faulkland Road  
Wilmington, DE 19805

**15-12 Post Employment—WAIVER GRANTED**

**Hearing and Decision By:** *William F. Tobin, Jr., Chair; Andrew Gonser, Esq., Vice Chair;*  
*Commissioners: Jeremy Anderson, Esq., Dr. Wilma Mishoe*

Dear Ms. McManus,

Thank you for attending the Commission meeting on July 21, 2015 to which you were accompanied by Matthew Payne. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow your agency to contract with Mr. Payne, a former employee of the Department of Technology and Information (DTI). Ordinarily, under your circumstances contracting with a former State employee before the expiration of the two year post-employment restriction is prohibited, but the Commission decided to grant a 90 day waiver based upon agency hardship.

**FACTS**

You work for the Department of Services for Children, Youth and their Families (DSCYF) as Director of the Division of Management Support Services (DMSS). DMSS provides administrative and technical support to the other four divisions of DSCYF. Your Division is responsible for human resources, information technology, facilities management, and fiscal management services. In carrying out those duties, DMSS is the principle contact with the State's central agencies and government offices.

DSCYF is in the process of re-vamping their case management system. The 20 year-old system manages, tracks, and coordinates services to children and families across the Department's four service divisions. The current system, Family and Child Tracking System ("FACTS"), relies on an aging platform and infrastructure that is no longer supported by DMSS's

Management Information Unit. Additionally, FACTS does not facilitate information sharing across the divisions. The ability for interdivisional information sharing is important given the number of children who require coordinated services from multiple divisions.

In addition to providing day-to-day case management services, the database must meet federal Statewide Automated Child Welfare Information System (SACWIS) and other Federal reporting requirements, such as the Adoption and Foster Care Analysis and Reporting System (AFCARS), the National Youth in Transition Database (NYTD), the National Child Abuse and Data System (NCANDS) and the Child and Family Services Review (CFSR) process. Failure to comply with any of the above requirements could result in administrative and monetary penalties to be levied against the State. Additionally, the database provides a medium through which your agency pursues Medicaid and other service reimbursements which allows the State to recover federal funds for child welfare and mental health related services. If DMSS suffers a system failure the State would be unable to recover those federal funds. Between 2011 and 2014, the State recovered more than \$22 million in that manner.

In 2011, the Department obtained funding for a project, titled "FACTS II," to replace the FACTS system. The goal of the project is to provide an integrated system that is updated, reliable, supportable, and that allows for information sharing across Divisions. Deloitte was selected as the vendor to develop the system. DTI Secretary Jim Sills was a co-executive sponsor of the FACTS II project, along with your Department's Cabinet Secretary, Jennifer Ranji. However, DTI did not play a central role in the project, opting to select a contractor to manage the project.

In late Winter and Spring 2014, when the State began testing the FACTS II system, it was discovered that there were significant issues with the system that had thus far been developed by Deloitte. Over 4,000 defects were discovered during testing, and the State had concerns regarding the Deloitte project leadership. In late Spring 2014, user acceptance testing was halted due to the high number of defects. Throughout the Summer of 2014, Deloitte and the State worked to correct the problems by adding additional personnel to the project. The State contracted with Computer Aid Incorporated (CAI) to develop test scripts to facilitate testing of the system and Deloitte added a new project leader. In October, the State expanded its contract with CAI to hire a new project manager, replacing the individual contractor who had served as the FACTS II project manager since the project's inception.

In late Summer/early Fall 2014, Secretary Sills left DTI, and Secretary Ranji and newly confirmed DTI Secretary James Collins agreed to increase DTI's involvement in the project. As a result, Secretary Collins assigned Matthew Payne, a DTI employee to the project. Until then, Mr. Payne had not worked on FACTS II. Mr. Payne attended his first meeting related to the FACTS II project in November 2014. In June 2015, Mr. Payne left State service and accepted a position with CAI.

Prior to his retirement Mr. Payne's primary role in the FACTS II project was to help ensure that the Department's and the State's interests were being represented. Because of Mr. Payne's technical and project management experience, his assistance was invaluable to DSCYF for planning purposes and in negotiations with Deloitte. Since the Fall of 2014, the State team and CAI have made significant progress towards continued development of the FACTS II project. The State completed a technical analysis to identify the areas in which the system does not meet the Department's needs. Over the next 2-3 months, DMSS will be re-engaging in negotiations with Deloitte to remediate the deficiencies identified during the testing period and to develop a timeline and budget for completion of the project.

## **Appendix E**

You believe that Mr. Payne's experience with FACTS II and his previous involvement during negotiations with Deloitte are critical to the success and completion of the project. This is especially true as you continue negotiations with Deloitte and plan for completion of the project. However, you also recognize that Mr. Payne would be violating the two year post-employment restriction in the Code of Conduct by working on the FACTS II project while employed in the private sector. As a result, you are requesting a hardship waiver on behalf of DMSS and DSCYF.

## **APPLICATION OF THE FACTS TO THE LAW**

**A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).**

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7<sup>th</sup> Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Mr. Payne would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Mr. Payne worked on the FACTS II project while he was employed by the State. At the hearing he stated that he served in an advisory role for the project rather than providing technical expertise. Nevertheless, there is no doubt that Mr. Payne's continued presence on the project after leaving State service is a violation of the two year post-employment restriction in the Code of Conduct. This job switch is exactly the type of situation the statute was designed to prevent.

The Commission then turned to a consideration of whether there are adequate facts and circumstances to justify a waiver based upon agency hardship.

**B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

**(1) "Undue hardship,"** means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

Deloitte is an international consulting conglomerate with over 70,000 employees and \$14.91 billion dollars in revenue in fiscal year 2014.<sup>2</sup> Since DSCYF suspended user testing of FACTS II, due to the high number of product defects, the relationship between Deloitte and your negotiating team has been contentious with each party blaming the other for the end result. Your agency has already invested over three years and a substantial amount of money into the development of the FACTS II project. You stated that Deloitte's representatives have an advantage during the on-going negotiations because of their familiarity with the highly technical issues involved. This is knowledge that neither you, nor your colleagues, possess. The knowledge gap is not pointed out in a disparaging manner but only to highlight the disadvantage your agency experiences while involved in this contentious contract dispute. It is those particular skills that you believe Mr. Payne can provide during the next few months while your agency and Deloitte attempt to come to an agreement regarding the completion of the FACTS II project.

At the hearing, Mr. Payne stated that prior leaving the State he had been employed by DTI for six years. Before he began working for the State, Mr. Payne worked in the private sector and acquired job experience which is relevant to your current situation. However, Mr. Payne is now employed by CAI, the company that your agency retained to write test scripts and provide project management services for FACTS II. When asked, Mr. Payne stated he left State employment because he did not have confidence that he would be able to retain his position when the current administration changes with the 2016 election.

The Commission is concerned about the conflicts of interest that may arise if your agency accepts contractual advice from Mr. Payne as a representative of CAI, a company that is providing ancillary services on the FACTS II project. When asked if CAI could apply to replace Deloitte if the contract negotiations failed, you indicated that they would be welcome to bid on the project like any other interested vendor. Mr. Payne indicated he did not know how CAI would proceed under those circumstances. While it was clear to the Commission that the waiver request was made at the behest of your agency rather than at Mr. Payne's request, and although the scenario is not ideal, contracting with Mr. Payne as a private contractor places some degree of separation between the contract negotiations and CAI.

Taking into consideration all the relevant facts and circumstances, as well as the huge investment your agency has already put into the FACTS II project, the Commission decided to grant a waiver based upon agency hardship. However, there are two caveats. First, Mr. Payne must agree to contract with your agency as an independent contractor and not as a representative of CAI. At the hearing, neither you nor Mr. Payne knew if CAI would allow such an arrangement but wanted to resolve the ethics issue prior to approaching CAI. Second, the waiver is granted for only 90 days from the date of the hearing. Such a time constraint is designed to minimize the length of time Mr. Payne will be allowed to violate the Code of Conduct and to promote an expeditious end to the contract negotiations with Deloitte.

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<sup>2</sup> Source: [http://www2.deloitte.com/us/en/footerlinks/about-us-deloitte.html?icid=bottom\\_about-us-deloitte](http://www2.deloitte.com/us/en/footerlinks/about-us-deloitte.html?icid=bottom_about-us-deloitte), July 27, 2015. These figures are for Deloitte's U.S. businesses.

## **(2) Is literal application of the law necessary to serve the public purpose?**

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. "*Ethics in Government Act*," *Senate Report No. 95-1770*, p. 32. In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides—.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07.*

The public does have an interest in preventing the failure of DSCYF's technical infrastructure. First, a great deal of money is recovered from the Federal government for the State through use of the agency's computer system. Next, DSCYF has already expended significant resources towards the development of the project. All of those resources would be wasted if the contract negotiations between Deloitte and DSCYF were to proceed under circumstances in which you acknowledge your agency is operating at a disadvantage. Also weighing in favor of serving the public purpose is the fact that if the Commission grants a waiver the decision becomes a matter of public record. That ensures that the public knows why this former State employee was allowed to contract with a State agency in contravention of the Code.

## **CONCLUSION**

DMSS, and by extension, DSCYF is granted a 90 day waiver of the post-employment restriction in the Code of Conduct based upon agency hardship. The waiver is to allow your agency to contract with Mr. Payne, as an individual, to assist you in contract negotiations with

Deloitte. Because the Commission has granted a waiver, this opinion will be printed in its entirety on our website. If you have any questions, please feel free to contact us.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.  
Chairman